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NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY TODISCO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Government itself, as opposed to the telephone company, may install pen registers without a search warrant.

2. Whether agents of the federal government are precluded from installing pen registers unless they meet the requirements of the Foreign Intelligence Surveillance Act where international narcotics trafficking is involved.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No.

ANTHONY TODISCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, ANTHONY TODISCO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 22, 1981.

OPINION BELOW

The opinion of the Court of Appeals, reported in *United States v. Todisco*, __F.2d__(2d Cir. 1981), Slip. op. 1380-1, 1385-6, 1391-2, 1395 (May 22, 1981) appears in the Appendix hereto. The District Court for the Southern District of New York issued no written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 22, 1981, affirming Petitioner's conviction entered February 4, 1981. A timely petition for rehearing *en banc* was denied on July 29, 1981. On September 9, 1981, Mr. Justice Marshall signed an order extending the time for filing this petition for certiorari to and including October 27, 1981. This Court's jurisdiction is invoked under 28 U.S.C.§1254(1).

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. §2 (1976) and under 28 U.S.C. §1331 (general federal question jurisdiction).

In April, 1980, the United States Attorney's Office in the Southern District of New York embarked on a plan to seek out narcotics dealers by using an undercover agent. Petitioner's business associate, Mr. Vallone, was pointed out to the agent as a "source of the heroin". By virtue of his association with Mr. Vallone, Petitioner also came under suspicion.

As a result, in June, 1980, the government obtained orders from a Southern District Magistrate, under Federal Rules of Criminal Procedure 57(b), to install two pen registers on petitioner's home telephones. The government was directed to install the registers. Agents of the Drug Enforcement Administration (DEA) did so, using DEA equipment.

The pen registers revealed phone calls from Petitioner to Mr. Vallone, and to Mr. Torres, a suspected narcotics distributor. Although the bona fide business relationship between Mr. Vallone and the Petitioner could have ex-

plained their calls, these calls and the call to Mr. Torres became key factors in the probable cause needed for a subsequent eavesdropping warrant issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

In September, 1980, DEA agents made a warrantless entry of an apartment in the Bronx, ostensibly to arrest Petitioner. In the apartment they discovered and seized quantities of heroin. Petitioner was arrested. He pled guilty before trial in the District Court, preserving his right to appeal from all pre-trial applications. He was sentenced to five consecutive thirty-year terms, to be followed by ten years special parole. He appealed to the Circuit Court which affirmed the court below. The Circuit Court later denied Petitioner's timely request for rehearing *en banc*. Petitioner is presently incarcerated serving his sentence.

REASONS FOR GRANTING THE WRIT

(1) The decision below gives little effect to this Court's holdings on pen registers, by failing to recognize the distinction between those installed by the telephone company and those installed by the government.[1]

In the *United States v. New York Telephone Company*, 434 U.S. 159 (1977) this Court held pen registers could be installed by the telephone company upon the issuance of a regular search warrant. Pen registers were found not to come under the coverage of Title III of the Omnibus Crime Control and Safe Street Act of 1968.

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1. The Circuit Court suggested, incorrectly albeit, that the pen register issue had been waived below. The court ignored, however, the extensive hearings held as to the propriety of the registers and the joining of all counsel in the motions and applications of one another—more than adequate to protect the issue presented herein.

There was "undisputed . . . probable cause" in *New York Telephone Company*, with "no claim . . . that [the register's installation] was in anyway inconsistent with the Fourth Amendment" 434 U.S. at 168-69, so the order was held valid. This Court noted that its finding was supported by, but not based upon, Federal Rules of Criminal Procedure Rule 57(b), which allows a court to "proceed in any lawful manner" when "no procedure is specifically prescribed by rule . . ." It expressly stated, however, that "we need not and do not decide whether Rule 57(b) by itself would authorize the issuance of pen register orders . . . . " *Id.* at 170.

This question remains unanswered today, when, as in *New York Telephone Company* and Petitioner's case, the government itself installs the pen register. The only court decision involving pen registers since *New York Telephone Company*, was *Smith v. Maryland*, 442 U.S. 735 (1979). That case involved a register installed by the telphone company at the government's request. Neither search warrant nor court order preceded installation. The register was challenged on the ground that it constituted an illegal search under the Fourth Amendment. The Court framed the issue as whether a legitimate expectation of privacy was violated when the telephone company itself installed the register; a legitimate expectation being one that is both subjectively held, and recognized by society as reasonable. *Id.* at 740, 742, citing to *Katz v. United States*, 389 U.S. 347 (1967). The Court found "[a]ll subscribers realize . . . the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long distance (toll) calls on their monthly bills." *Id.* at 742. Further, even if a subjective expectation of privacy were harbored, it would not be "reasonable" in society's eyes. One has "no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 443-44. The telephone subscriber in *Smith* was held to

have "assumed the risk" that the telephone company would use its facilities for recording phone numbers to record his local calls, and then reveal that information to the police. Therefore, no "search" had occurred within the meaning of the Fourth Amendment. This "assumption of risk" analysis has already begun to reap criticism from commentators, even as applied to the *Smith* facts. *See* C. Fishman, *Pen Registers and Privacy,* Catholic U.L. Rev. 557.

The holding in *Smith* is inapplicable to Petitioner's case because the reasoning behind it does not apply where the telephone company does not install the pen register. The facts at hand correspond closely to those in *New York Telephone Company.* In both, the court order directed government agents to install the register, with the telephone company directed only to supply any necessary assistance. Even if *Smith's* assumption of risk theory is accepted as applied to registers installed by the phone company, nothing in *Smith* would support the conclusion that telephone subscribers assume the risk that the *government* is monitoring their home telephone calls using government equipment installed by government agents. Under these circumstances, a completely different level of risk would have to be assumed. The subscriber would be forced not only to bear the risk that the telephone company, which necessarily monitors at least some of his calls, will reveal information to outside parties, but also that the government might insinuate itself directly into his telephone lines, coming between the subscriber and the phone company. This government intrusion would require that the telephone company merely acquiesce in the government's use of company property in return for payment. The telephone company would be neither gathering nor passing on any information voluntarily relinquished to it by the subscriber. The government would have stepped into

the company's shoes, and, unknown to the subscriber, have replaced the company in the relationship giving meaning to the "assumption of risk" theory in *Smith*. The "assumption of risk" rationale implies some degree of "free and voluntary" choice by the subscriber. *See* W. L. Prosser, The Law of Torts, 4th Edition 450 (1971). In dealing with the telephone company, his "choice" is perhaps restricted, but he enters the relationship voluntarily. The company agrees to provide the services; the subscriber agrees to pay. Both realize the company will keep certain records concerning the subscriber's phone calls, mainly for business purposes, which might be considered an intrusion on his privacy that the subscriber is willing to tolerate. The telephone company and the subscriber have an agreement, to which the government lacks privity. To allow the government to take advantage of the phone company's standing in relation to that agreement, without the subscriber's permission (and without a judicial showing of probable cause) is without support in the law.

This could not have been this court's intention in *Smith*. In the case at bar, the court's dual criteria for a legitimate expectation of privacy are met. The phone subscriber has a subjective expectation that the government is not monitoring his calls and a reasonable basis for that belief. Cases in which the *government* installs the pen register, therefore, must necessarily fail to come within *Smith's* holding.

Assuming *Smith* inapplicable, Petitioner's case can only be governed by this Court's decision in *New York Telephone Company*, where the question whether a Rule 57(b) order alone may authorize government agents to install a pen register was left open. Petitioner's dilemma illustrates the urgent need for clarification of this issue. The Second Circuit decision illustrates the confusion to which

lower courts are now subject, for it dismissed this issue on the ground that *Smith* controlled.

As Mr. Justice Marshall stated in his dissenting opinion in *Smith*, "whether privacy expectations are legitimate . . . depends not on the risks [one] can be presumed to accept . . . but on the risks he should be forced to assume in a free society." *Id.* at 750, (*Marshall*, J., dissenting). Many citizens with nothing illicit to hide may be harmed if the government can monitor the destination of their phone calls without probable cause, including political organization members and journalists with confidential sources. *Id.* This problem exists, of course, even when the telephone company installs the pen register. It is, even more salient when the government installs it. To safeguard privacy in a free society, it is not overburdensome to require the government to show probable cause for the invasion.

(2) The pen register involved here required a special surveillance warrant pursuant to the Foreign Intelligence Surveillance Act (FISA), because the illicit activity at issue involved importation of narcotics from outside the United States.

FISA [50 U.S.C. §§1801-1811] controls the use of electronic surveillance within the United States, by federal agents, for the purpose of gathering foreign intelligence information. Foreign Intelligence information includes any which relates to the "national defense or security of the United States or to the conduct of foreign affairs." 50 U.S.C. §1801(e)(2). From its earliest stages, Petitioner's case involved federal agents investigating the importation of narcotics. Narcotics importation is a problem of significance on a national and international level, which presents an inherent threat to national security. *See generally*, International Control of Narcotic Drugs, World Association of Lawyers, 1976.

Under FISA, federal officials must have a court order to obtain the "contents" of wire communications. 50 U.S.C. §1805. The legislatie history of the Act states that a pen register provides sufficient information to be included under "contents". H.R. Representative No. 1283, 95th Congress, 2d Session 67 (1978).

Congress did not specify what kind of "court order" is required under FISA, but must reasonably be presumed to have intended a search warrant, FISA electronic surveillance order, or Title III interception order, based on classification of pen registers as devices which intercept contents of communications. *See* Fishman, *supra*. Because the 57(b) order in Petitioner's case did not meet the standards of any of these, the pen register was unlawful, and all evidence flowing from it should have been suppressed.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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October 27, 1981

APPENDIX A—DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1380-1, 1385-6, 1391-2, 1395—September Term, 1980
(Argued May 20, 1981 Decided May 22, 1981)
Docket Nos. 81-1052-1058

UNITED STATES OF AMERICA,

Appellee,

-v.-

ANTHONY TODISCO, ANTHONY VALLONE, JOHN CAMPOPIANO, SALVATORE SFERAZZA, ALFONSE ZAMBUTO, LEONARD BARRACANO, and DAVID D'ANGELO,

Defendants-Appellants.

Before:

MOORE, TIMBERS and MESKILL,
Circuit Judges.

Appeals from judgments of conviction entered in the Southern District of New York, Robert J. Ward, *District Judge*, of violations of the federal narcotics laws.

Affirmed.

BARRY IVAN SLOTNICK, New York, N.Y. (Jay L. T. Breakstone, New York, N.Y., on the brief), *for appellant Todisco.*

MICHAEL YOUNG, New York, N.Y. (Goldberger, Feldman, Dubin & Young, New York, N.Y., on the brief), *for appellant Vallone.*

JULIA HEIT, New York, N.Y. (Edward Panzer, New York, N.Y., on the brief), *for appellant Barracano.*

MICHAEL L. SANTANGELO, New York, N.Y., *for appellant Campopiano.*

ANTHONY V. LOMBARDINO, Kew Gardens, N.Y., *for appellant Sferrazza.*

ALBERT A. GAUDELLI, Flushing, N.Y., *for appellant Zambuto.*

STEVEN B. DUKE, New Haven, Conn., *for appellant D'Angelo.*

RICHARD A. MARTIN, Asst. U.S. Atty., New York, N.Y. (John S. Martin, Jr., U.S. Atty., Lawrence F. Ruggiero, Mark F. Pomerantz and Mary Jo White, Asst. U.S. Attys., New York, N.Y., on the brief), *for appellee.*

PER CURIAM:

Appellants were convicted on various counts of a fifteen count indictment which charged them with conspiracy, and the distribution, possession and possession with intent to distribute heroin, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. §2 (1976). All appellants except D'Angelo pled guilty following the denial of their motions to suppress certain evidence, but preserved their right to appeal from the denial of their pretrial motions. D'Angelo was convicted following a jury trial. From the judgments of conviction entered on

February 4, 1981, Robert J. Ward, *District Judge*, all appellants have appealed. For the reasons below, we affirm the convictions of all appellants on all counts.

The indictment followed a four month investigation by 65 agents of the Drug Enforcement Administration (DEA). The investigation concluded on September 3, 1980, at which time a $900,000, 3 kilogram, heroin sale was slated to take place in several installments. The sale had been negotiated between undercover DEA agents and appellants and their associates. To the extent relevant to the issues on appeal, the details of that investigation will be set forth below. For convenience, we shall rule upon the issues raised on appeal by referring to the events before, on and after September 3, 1980.

1. Events Before September 3, 1980

We hold that no search warrant was required for the installation of two "pen registers" on appellant Todisco's telephones. *Smith v. Maryland*, 442 U.S. 735 (1979). We are not persuaded by appellant's effort to distinguish the *Smith* case on the ground that the pen register there was installed with the assistance of the telephone company. First, the Court in *Smith held that the telephone company was acting as an agent of the police for Fourth Amendment purposes. Id.* at 739, n.4. Moreover, the Court's reasoning—that the installation of a pen register is not a Fourth Amendment search—applies with equal force to this case. In any event, appellants did not move for the suppression of the evidence obtained from the pen register and have not attempted to justify their delay. Their claim, even if it were meritorious, has been waived. *United States v. Rollins*, 522 F.2d 160, 165 (2 Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

There was ample probable cause to support the wiretaps on Todisco's telephone. They were authorized by

Chief Judge Weinstein in the Eastern District of New York on August 7, 1980, and were extended by Judge Nickerson of the same court on August 26, 1980. Aside from the deference properly accorded to the determination by the issuing judge that there was probable cause, *United States v. Perry*, No. 79-1047, slip op. 6749, 6772 (2 Cir. Feb. 9, 1981), we hold, viewing the supporting affidavits as a whole and in a practical and common sense manner, *United States v. Steinberg*, 525 F.2d 1126, 1130 (2 Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), and in light of the ongoing investigation, that there was probable cause. Todisco, a known narcotics dealer, had numerous contacts with individuals who were selling large quantities of heroin to undercover DEA agents. The pen register had disclosed numerous calls to other known narcotics dealers. Todisco also was seen publicly with known dealers. While these contacts, as appellants suggest, are subject to an innocent interpretation when viewed in isolation, in view of the ongoing investigation and the close proximity in time between many of the contacts and the known sales, we hold that there was probable cause to believe that Todisco was involved.

We also hold that the affidavits adequately alleged that normal investigative procedures had been or would be ineffective. The affidavits did disclose the standard investigative techniques which had been employed and the paucity of evidence which had resulted, or could be expected to result, therefrom. *United States v. Vasquez*, 605 F.2d 1269, 1282 (2 Cir.), *cert. denied*, 444 U.S. 981 (1979). Appellants' observation that the language employed in the affidavit in this regard resembled that used in another case is irrelevant, especially since there is no claim that the assertions are untrue or do not apply to the facts herein.

We also hold that the application was properly authorized. Order No. 799-78 clearly was adequate to em-

power the Assistant Attorney General of the Criminal Division, Philip Heymann, to authorize the application. *In re Weir*, 520 F.2d 662, 667 (9 Cir. 1975). There is no question here, as there was in *United States v. Giordano*, 416 U.S. 505 (1974) (relied upon by appellants), that the Assistant Attorney General did not actually sign the memorandum approving the application. There is no requirement that the authorizing official must recite his reasons for approving a recommended wiretap application. We decline appellants' invitation to hold that the district court erred in refusing to hold a full evidentiary hearing based on appellants' unfounded speculation.

Finally, with respect to the events before September 8, 1980, we hold that the district court's finding of fact that the "August 8, 1980" date on the order authorizing the wiretaps was a ministerial error and therefore insignificant, was not clearly erroneous.

2. Events on September 3, 1980

We hold that the warrantless arrest of Todisco in Apartment 3C at 610 Waring Avenue was lawful. There can be no doubt that, under the precedents in this Circuit, the district court did not err in refusing to suppress the "fruits" of that arrest, including the evidence uncovered in the subsequent search of the apartment. *United States v. Campbell*, 581 F.2d 22, 26 (2 Cir. 1979); *United States v. Reed*, 572 F.2d 412, 424 (2 Cir. 1978), *cert. denied*, 439 F.2d 913 (1978). Todisco was known to be engaged in a serious crime at the time of his arrest. One of his cohorts had just been arrested with a gun. And, most compellingly, Todisco was in a position to destroy substantial evidence of his guilt. Appellants' assertions that the DEA agents somehow "manufactured" these events are belied by the facts. The agents had no way of knowing, before the events

occurred, that Todisco, at the time of the arrests, would be secreted with a large quantity of heroin waiting for co-appellant Vallone to return. While an arrest warrant could have been obtained before September 3, we decline, on the fact of this case, to interfere with the discretion accorded narcotics agents to determine when they will make an arrest. *See United States v. Santiago*, 327 F.2d 573 (2 Cir. 1964). That is especially so here, where there simply is no basis for the claims of appellants.

Since the arrest of Todisco, and the entry subsequent to his arrest, were lawful, there is no question that the search of Apartment 3C, pursuant to a warrant issued on September 3, 1980, also was lawful.

Appellants' claims regarding the warrantless arrest of appellant Sferrazza, and the search of the Zambuto residence subsequent to that arrest, also are without merit. Based on the wiretap evidence, and the DEA agents' observations of the meeting between Sferrazza and Todisco on the morning of the September 3 heroin sale, the agents clearly had probable cause to arrest Sferrazza. In the district court Sferrazza unequivocally withdrew his claim that the warrantless arrest in the Zambuto residence somehow violated his Fourth Amendment rights. He also withdrew his claim that evidence seized subsequent to that arrest, and his confession to DEA agents, should be suppressed for that reason.

In view of the claims of other appellants regarding the Sferrazza arrest, however, we hold that, even assuming that a warrant was required to arrest Sferrazza in Zambuto's home absent exigent circumstances, *Steagold v. United States*, 49 U.S.L.W. 4418 (U.S. April 21, 1981), the arrest here nevertheless was proper. In that regard, we hold that Judge Ward's findings of fact, stated on the record on December 4, 1980, that exigent circumstances justifying the warrantless arrest clearly existed under the

standards set forth in *United States v. Reed, supra*, were not clearly erroneous.

We hold that the evidence seized in the Zambuto home following the Sferrazza arrest was admissible. Mrs. Zambuto's affirmative assistance in the discovery of $300,000 in cash hidden in the Zambuto basement is compelling evidence that she voluntarily consented to the search, *United States v. Rothberg*, 460 F.2d 223 (2 Cir. 1973). The money therefore was admissible. The district court found that Mrs. Zambuto's testimony that she was coerced by the DEA agents to assist in their search was "unbelievable." This finding was based in part on her demeanor and her unresponsive answers to questions on cross-examination. The district court challenged "any who read the record [to] find otherwise." Having carefully read the record, and according deference to the district court's determination of witness credibility, *Alessi v. United States*, 628 F.2d 1133, 1135 (2 Cir. 1980), we hold that the district court's admission of this evidence was proper.

Similarly, we hold that Sferrazza knowingly and intelligently waived his *Miranda* rights before making incriminating statements to the DEA agents. Based on Sferrazza's in-court behavior and the recorded telephone conversations involving him, the district court had an ample basis for discounting appellant's claim that he did not understand English.

We further hold that the execution of the search warrant covering the Zambuto home on the evening of September 3 did not violate anyone's rights under the Fourth Amendment. The district court's finding of fact that the search began before 10 P.M. was not clearly erroneous, in the light of testimony that the agents were notified by telephone that the warrant had been approved by Magistrate Chrein at 9:50 P.M.

The search of Todisco's home, pursuant to a warrant issued on September 3, also was lawful. There is no incon-

sistency between the September 3 application for that warrant and the DEA agents' earlier application for a wiretap order for Todisco's telephone. There was no evidence, prior to Todisco's arrest on September 3, that he ever physically possessed heroin. There is no merit in appellants' claim that the agents were required to discuss with the magistrate on September 3 the contents of the earlier, irrelevant, application for a wiretap.

3. Events After September 3

We hold that the district court did not abuse its discretion in refusing to grant a continuance after the filing of a superseding indictment on November 25, 1980. First, the Speedy Trial Act, 18 U.S.C. §3161(c)(1980 Supp.), does not divest the district court of its discretion to grant or refuse a continuance. The district court's inquiry and ruling on the motion for a continuance was consistent with the guidelines promulgated by this Circuit under the Speedy Trial Act. Guidelines Under the Speedy Trial Act, II L, comment, at 31 (January 16, 1979). While those guidelines do not have the force of law, they are entitled to appropriate respect. Appellants' arguments do not convince us that those guidelines are incorrect or inconsistent with the statute, or that 18 U.S.C. §3161(c) stripped the district court of its discretion under the circumstances of this case.

In view of the fact that the charges in the superseding indictment were substantially the same as those in the original indictment and in view of the fact that substantial discovery had taken place, we hold that the district court did not abuse its discretion in refusing to grant a continuance.

Similarly, the district court did not abuse its discretion in refusing to grant D'Angelo a continuance on the eve of trial to obtain new counsel. The court gave D'Angelo an ample and continuing opportunity to air his complaints

about counsel. These amounted to no more than a disagreement about tactics and an unspecified "loss of confidence." The court had ample opportunity to observe counsel and to note his competence during the months before trial when the same counsel represented D'Angelo, without incident. In addition, the court did its utmost to accommodate D'Angelo's concerns without disrupting the scheduling of this complex jury trial. We repeatedly have expressed our concern that district courts be wary of eleventh hour requests for new counsel. *E.g., United States v. Carroll*, 510 F.2d 507, 510 (2 Cir. 1975); *United States v. Llanes*, 374 F.2d 712, 717 (2 Cir. 1967). Under the circumstances of this case, we hold that the district court's refusal to grant a continuance was a proper exercise of his discretion.

We also hold that D'Angelo's representation at trial was by no means constitutionally ineffective under this Circuit's standard. *E.g., United States v. Bubar*, 567 F.2d 192, 202 (2 Cir. 1977), *cert. denied*, 434 U.S. 872 (1977). We find no merit in the claim that the district court deprived D'Angelo of a fair trial by failing to exclude evidence which appellant's counsel made a conscious, tactical, decision to present.

We further hold that there was sufficient evidence to support the jury verdict convicting D'Angelo. First, the court did not err in admitting the hearsay statements of D'Angelo's co-conspirators. There was ample independent evidence of D'Angelo's participation in the conspiracy to permit the admission of these statements. *United States v. Geaney*, 417 F.2d 1117 (2 Cir. 1969). The court and jury were free to reject D'Angelo's "innocent" interpretation of the telephone calls and clandestine meetings which D'Angelo had with Todisco and his associates. *United States v. Weisman*, 624 F.2d 1118, 1130 (2 Cir. 1980), *cert. denied*, ____U.S.____ (1981). In asking us to accept his innocent gloss on the evidence before the district court, D'Angelo in effect is asking us to view those events in

isolation and to disregard the fact that they occurred during substantial heroin sales to undercover agents. We hold that there was sufficient evidence upon which the jury could find D'Angelo guilty beyond a reasonable doubt.

Finally, we hold that Todisco's claim that his guilty plea was not knowingly and intelligently made is frivolous. Todisco, represented by counsel, engaged in a colloquy with the district court which more than adequately demonstrated that he understood the nature of the charges to which he pled guilty.

All appellants were convicted of serious offenses on the basis of overwhelming evidence of guilt—six by pleading guilty and one after a jury trial. Our careful examination of the record satisfies us that all appellants were accorded a fair hearing, by a conscientious district judge, on their pretrial motions and, in the case of one appellant, at his jury trial. We affirm the convictions of all appellants on all counts. We order that the mandate issue forthwith.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY TODISCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether government agents may install a pen register without a warrant.

2. Whether the Foreign Intelligence Surveillance Act requires warrant authorization for a pen register used to investigate domestic narcotics trafficking.

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No. 81-805

ANTHONY TODISCO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981. A petition for rehearing was denied on July 29, 1981. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 27, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York upon entry of a guilty plea to one count of conspiracy to possess and distribute heroin, 21 U.S.C. 846, and four counts of possession of heroin with intent to distribute it, 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to 30 years' imprisonment, to be followed by ten years' special parole.

Petitioner was the head of an organization that engaged in the wholesale distribution of massive amounts of extraordinarily pure heroin to other drug dealers in the New York City area. Petitioner arranged for the wholesale deliveries and sales of heroin. Two of petitioner's lieutenants, co-defendants Vallone and Barracano, stored and delivered heroin for petitioner. Co-defendants Torres and Acosta functioned as sellers and promoters. Co-defendants D'Angelo and Sferrazza were the chief suppliers of heroin for petitioner's organization. Co-defendant Zambuto stored heroin at his house, and co-defendant Campopiano, petitioner's uncle, helped plan sales and coordinate supplies.

The investigation of petitioner's organization began after an informant brought a Drug Enforcement Administration (DEA) agent a sample of heroin purchased from co-defendant Luis Acosta. Thereafter, DEA Agent William Silvestri, acting in an under-

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[1] Petitioner and seven of his co-defendants pleaded guilty prior to trial on the condition that they could appeal the denial of certain pre-trial motions. The one remaining co-defendant, David D'Angelo, was convicted following a jury trial. Three of the co-defendants have filed certiorari petitions, which raise issues unrelated to those presented by petitioner. *Zambuto* v. *United States*, No. 81-551; *D'Angelo* v. *United States*, No. 81-617; *Vallone* v. *United States*, No. 81-754.

cover capacity, began purchasing heroin from petitioner's organization. On May 14, 1980, Acosta and Torres made their first sale to Silvestri—one ounce of heroin for $9,500 (Tr. 574-582).[2] Agent Silvestri made four additional heroin purchases, approximately one eighth of a kilogram each, on May 27, June 26, August 1 and August 14, 1980 (Tr. 617-622, 681-691, 769-772, 1035-1038). On September 1, 1980, Agent Silvestri arranged to purchase three kilograms of heroin from Acosta on September 3. The sale was to take place in six half-kilogram installments (Tr. 1091-1108). At 9:25 a.m. on September 3, petitioner and co-defendant Vallone left petitioner's house and drove in separate cars to an apartment at 610 Waring Avenue in the Bronx. Petitioner and Vallone left the apartment at 10:30 a.m., and Vallone made the first delivery of half a kilogram of heroin. Vallone and petitioner returned separately to 610 Waring Avenue, and subsequently Vallone left to deliver the second half kilogram of heroin. Vallone was arrested in route to the second delivery. Petitioner had also left the Waring Avenue apartment but returned at 11:55 a.m. He was arrested inside the Waring Avenue apartment at 12:20 p.m. (Tr. 1170-1176; H-Tr. 1759-1766, 1772-1776).[3] A subsequent search of the apartment pursuant to a warrant revealed that it was a narcotics "stash." The apartment contained two kilograms of pure heroin, material for diluting and packaging the heroin, and several firearms (Tr. 1182-1192).

In June 1980, during the course of its investigation of petitioner's organization, the government obtained

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[2] "Tr." refers to the transcript of the D'Angelo trial.

[3] References to the transcript of pretrial hearings are cited as "H-Tr."

orders from a Magistrate in the Southern District of New York, under Fed. R. Crim. P. 57(b), to install two pen registers on petitioner's home telephones. The information obtained from the pen registers later contributed to the finding of probable cause necessary to obtain a warrant for electronic surveillance of petitioner's telephone.

ARGUMENT

1. Petitioner contends (Pet. 3-7) that a pen register may not be installed by federal agents unless authorized by a search warrant based on probable cause. Petitioner did not raise this claim before the district court, and the court of appeals properly held that the claim had been waived (Pet. App. 3a). *United States* v. *Rollins*, 522 F. 2d 160, 165 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976). But even if petitioner's claim had not been waived, it is without merit because it is squarely foreclosed by this Court's decision in *Smith* v. *Maryland*, 442 U.S. 735 (1979). In that case the Court held that the operation of a pen register is not a search within the meaning of the Fourth Amendment (442 U.S. at 745-746). Petitioner attempts to distinguish *Smith* on the ground that there the pen register was installed by telephone company officials at the request of the police, whereas here the pen register was installed directly by DEA agents. But in *Smith* this Court explicitly assumed that the telephone company was acting as the agent of the police for Fourth Amendment purposes. 442 U.S. at 739 n.4.[4] Accordingly, there

[4] That assumption was necessary in order to make the threshold determination that there was sufficient "state action" to make Fourth Amendment analysis appropriate.

is nothing to distinguish the facts in this case from those presented in *Smith* v. *Maryland*, *supra*, and there is no need for further review of petitioner's claim.[5]

2. Petitioner contends (Pet. 7-8) that the Foreign Intelligence Surveillance Act, 50 U.S.C. (Supp. III) 1801 *et seq.* ("FISA"), forbids the use of a pen register without a warrant in the investigation of a major narcotics organization. Petitioner did not raise this claim below either, and therefore it also has been waived. *United States* v. *Rollins*, *supra*. In any event, the claim has no merit. The FISA applies when the "target of the electronic surveillance is a foreign power or an agent of a foreign power * * *." 50 U.S.C. (Supp. III) 1805(a)(3)(A).[6] Accordingly, the FISA warrant procedure could not be

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[5] Petitioner's assertion (Pet. 4-6) that he had a legitimate expectation of privacy from governmental, as opposed to telephone company, discovery of the numbers he dialed is inconsistent with the Court's reliance in *Smith* on the established principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" (442 U.S. at 743-744; citations omitted). It can hardly make a constitutional difference that the telephone company chose to turn the information flowing over its wires over to the government by permitting the DEA agents to have access to the telephone facilities themselves, rather than by installing the pen registers at government request and relaying the information they revealed to the government.

[6] When the FISA was enacted in October 1978, this Court had not yet ruled on whether the operation of a pen register constituted a search and seizure within the meaning of the Fourth Amendment. The legislative history reflects that Congress in that circumstance chose to include pen registers within the definition of "electronic surveillance" to be regulated by the provisions of FISA. H.R. Rep. No. 95-1283, 95th Cong., 2d Sess. 51, 97 (1978).

used when the targets of the investigation are American heroin dealers, such as petitioner, even though importation of heroin may be part of their scheme. The FISA simply has no applicability to petitioner's criminal conduct or the government's means of investigating that conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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